No. 92-1168

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TERESA HARRIS,
Petitioner,
v.
FORKLIFT SYSTEMS, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EMPLOYMENT LAW CENTER, A PROJECT OF THE LEGAL AID SOCIETY OF SAN FRANCISCO, THE CALIFORNIA WOMEN'S LAW CENTER, AND EQUAL RIGHTS ADVOCATES, INC. IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a plaintiff in a sexual harassment case also required to prove, in order to prevail, that she suffered severe psychological injury when the Trial Court has found that she was offended by conduct that would have offended a reasonable victim in the position of the plaintiff?

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae listed below file this brief in support of Petitioner Teresa Harris. Both parties have consented to the submission of this brief.

The EMPLOYMENT LAW CENTER (ELC), a project of the Legal Aid Society of San Francisco, is a private, non-profit, public interest law firm which represents indigent workers in cases involving employment

discrimination and workplace rights. The ELC specializes in, among other areas of the law, sex discrimination.

The ELC was counsel of record for Katherine Vinson in *Vinson v. Superior Court*, 43 Cal.3d 833, 239 Cal. Rptr. 292 (1987), in which the California Supreme Court ruled that a mental examination is not warranted in a simple sexual harassment case where the claimant seeks compensation for having to endure an oppressive work environment or for wages lost following an unjust dismissal.

Prior to the *Vinson* case, the ELC was counsel of record in *Priest v. Rotary*, 98 F.R.D. 755 (N.D. Ca. 1983), a sexual harassment case in which the Court denied discovery of detailed information about plaintiff's sexual history, including the name of each person with whom she had sexual relations in the ten years prior to the defendants' discovery request.

The ELC represented Lillian Garland in *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), which upheld California Government Code Section 12945(b)(2), a state law which provides up to four months of pregnancy disability leave and a right to return to the same or similar job.

The ELC also represented Queen Foster in *Johnson Controls, Inc. v. Fair Employment & Housing Commission*, 218 Cal.App.3d 517, 167 Cal.Rptr. 158 (1990), where the California Court of Appeal ruled that the employer's gender-based exclusionary "fetal protection" policy violated the Fair Employment and Housing Act. The ELC also appeared as *amicus curiae* in the United States Supreme Court in *International Union, UAW v. Johnson Controls*, —— U.S. ——, 111 S.Ct. 1196 (1991), in which the Court held that the employer's "fetal protection" policy constituted sex discrimination prohibited by Title VII of the Civil Rights Act of 1964.

The ELC has participated as *amicus curiae* in many discrimination cases before the United States Supreme Court, including *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Wygant v. Jackson Bd. of Education*, 476 U.S. 267 (1986), *reh. den.* 478 U.S. 1014 (1986).

EQUAL RIGHTS ADVOCATES, INC. (ERA) is a San Francisco-based public interest legal and educational corporation dedicated to working through the legal system to secure equality for women. ERA has a twenty year history of representing the interests of working women in the courts, legislatures, and public education campaigns.

Since its early days, ERA has worked to end sexual harassment both through litigation and public policy initiatives. ERA represented plaintiff in the first case in the Ninth Circuit to find sexual harassment a violation of Title VII (*Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979)). Even prior to that, ERA had appeared as *amicus curiae* in sexual harassment cases (e.g., *Tomkins v. Public Service Electric and Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977)).

The law firm has continued its efforts to eradicate sexual harassment from the work place. ERA represents individual plaintiffs in sexual harassment cases (e.g., *Colombano v. City and County of San Francisco*, Superior Court No. 838-649—woman police officer harassment case resulting in a settlement worth over $800,000). It has appeared before this Court as *amicus curiae* in cases involving sexual harassment issues (*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)) and in numerous lower court cases where various issues concerning sexual harassment have arisen.

In addition, ERA advises hundreds of women each year through its advice and counseling "hot line" regarding their legal right to be free from this invidious form of discrimination. The firm also provides technical assistance to scores of attorneys each year who are represent-

ing clients with sexual harassment claims. ERA has appeared before this Court as *amicus curiae* in dozens of sex and race discrimination cases interpreting Title VII and other anti-discrimination laws.

The CALIFORNIA WOMEN'S LAW CENTER was established in 1989 as the first Law Center in Southern California solely devoted to addressing the civil rights of women and girls. The Law Center has identified the following priorities for its work: Sex Discrimination in Employment, Sex Discrimination in Education, Reproductive Rights, Family Law, Domestic Violence and Child Care.

The Law Center's primary efforts in addressing these priorities emphasize support and technical and legal assistance to legal services agencies, community-based organizations, attorneys and policymakers.

Sex discrimination is clearly within the priority concerns of the Law Center. Therefore, the CALIFORNIA WOMEN'S LAW CENTER not only has a significant interest in the issues before the court, but has extensive background and expertise in the issues presented to the court in this appeal.

Amici believe that this Court's opinion in this case will set important precedent for the enforcement of Title VII of the Civil Rights Act of 1964, in the context of hostile work environment sexual harassment cases.

SUMMARY OF ARGUMENT

A requirement that a plaintiff prove "severe psychological damage" in order to establish liability in a hostile work environment sexual harassment case is contrary to this Court's prior holding in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Moreover, imposing such a requirement would contravene the purposes of Title VII.

Amici respectfully submit that the proper inquiry for determining whether conduct is sufficiently "severe or pervasive" to give rise to Title VII liability is to examine the harassing conduct complained of, not the plaintiff's response to it, from the perspective of a reasonable person *of the same gender* as the plaintiff. Adopting a gender-conscious perspective is essential to eradicating stereotyped notions and prevailing prejudices about women and eliminating all barriers to true equality in the workplace.

ARGUMENT

I. A REQUIREMENT OF "SEVERE PSYCHOLOGICAL DAMAGE" IN SEXUAL HARASSMENT CASES IS CONTRARY TO *VINSON* AND THE PURPOSES OF TITLE VII.

The question presented to the Court by this case is a narrow one: "Is a plaintiff in a sexual harassment case required to prove that she suffered severe psychological injury in order to establish the defendant's liability?" This Court's precedent mandates that the answer to that question is "no."

In the landmark case of *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court first recognized that a claim of hostile environment sexual harassment is actionable under Title VII of the 1964 Civil Rights Act. This Court rejected the argument that a violation of Title VII occurs only where the plaintiff can show "economic" or "tangible loss," finding Congress' intent was "to strike at the entire spectrum of disparate treatment of men and women." *Id.* at 64 (citations omitted). Recognizing that conduct "which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality" that racial harassment is to racial equality, this Court held that sexual harassment which is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment,'" is forbidden under Title VII, whether or not a tangible loss results. *Id.* at 67.

Vinson clearly stated that a hostile environment sexual harassment claim, to be successful, need not entail economic harm or other tangible discrimination; therefore, a plaintiff cannot be required to prove that she suffered severe psychological injury in order to prevail on such a claim. To require a demonstration of tangible harm at the liability stage is contrary to the plain language of this Court's unanimous opinion in *Vinson*. "Conduct can unreasonably interfere with work performance without causing debilitation and without seriously affecting an employee's psychological well-being." *Ellison v. Brady*, 924 F.2d 872, 878, n.8 (9th Cir. 1991).[1]

Requiring a plaintiff to demonstrate "severe psychological injury" in order to prove the existence of a hostile work environment is not only contrary to *Vinson*, it would also undermine the strong public policies underlying Title VII. Victims of sexual harassment would be forced to endure demeaning and degrading treatment long enough to sustain psychological injuries before they could take legal action to enjoin the harassing conduct. Employers would be shielded from liability for conduct which

[1] The *Ellison* court aptly notes the source of confusion which led the courts in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041, and *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986), mistakenly to require severe psychological harm. The courts in *Rabidue* and *Sears* misconstrued a citation in *Vinson* (*Vinson* at 66) from *Rogers v. E.E.O.C.*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), in which the *Rogers* court contemplates a working environment "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." As the *Ellison* court recognized, "[t]he *Rogers* court did *not* hold that a hostile environment only exists when the emotional and psychological stability of workers is completely destroyed." *Ellison* at 878, n.8 (emphasis in original). Requiring plaintiffs to show severe psychological damage as an element of plaintiff's case on this erroneous reading of *Vinson* in the *Rabidue* and *Sears* cases would create an altogether *new* and unprecedented element in sexual harassment law and compound *Rabidue* and *Sears*' defective legal analysis.

is "every bit the arbitrary barrier to sexual equality" at the workplace, when an employee understandably chose to leave a sexually hostile workplace before her psychological health was damaged. The myriad ways in which a requirement of "severe psychological injury" would thwart Title VII's goal of eliminating barriers to equal opportunity in the workplace are more fully discussed by other *amici* on behalf of petitioner and need not be repeated here.

In addition to undermining the goals of Title VII, a requirement of "severe psychological injury" also introduces a highly subjective and individualized element into the analysis which will make it difficult for employers to recognize and eliminate sexual harassment in their workplaces. Individual women may have widely differing psychological responses to the exact same conduct. The same behavior may cause psychological damage to one woman, while another feels offended, but is not psychologically injured. Without a clear standard employers are unable to determine what conduct is "severe or pervasive" enough to create a hostile work environment and to act affirmatively to ensure that such behavior stops. Where the harassing conduct complained of is exactly the same, there is no reason to find liability in one case and not another, simply because different individuals may be affected to different degrees.

An analysis of the degree of harm suffered as a result of the harassment may, of course, be relevant to determine the amount of damages. However, it is irrelevant to the determination of liability, and contravenes the language of *Vinson* when used for that purpose. Rather, a finding of hostile work environment sexual harassment should rest on an evaluation of the *conduct* of the defendant, *not* the effect it may have on a particular individual plaintiff.

The proper inquiry, as mandated by *Vinson*, is whether that conduct is sufficiently "severe or pervasive" to affect

the terms and conditions of employment and create an abusive working environment. The degree of the psychological effect on the plaintiff simply has no part in this analysis. In answering the narrow question presented by this case, this Court need not look beyond the standard it articulated in *Vinson*. If, however, any further explication of what constitutes a "hostile or abusive working environment" is necessary, this Court should follow the great weight of appellate court opinion, which has held that the harasser's conduct should be evaluated from the perspective of a reasonable person of the same gender as the plaintiff.

II. THE EXISTENCE OF A HOSTILE WORK ENVIRONMENT SHOULD BE DETERMINED BY AN OBJECTIVE EVALUATION OF THE HARASSER'S CONDUCT.

A. The Leading Cases Of *Andrews* And *Ellison* Articulate A Clear Formulation Of This Objective Inquiry.

Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990), provides a straightforward and often-cited statement that the perspective of "a reasonable person of the same sex" as the plaintiff should be used in analyzing the employer's conduct.[2] *Id.* at 1482. The court emphasized that this is an objective inquiry, and that "it is here that the finder of fact must actually determine whether the work environment is sexually hostile." *Id.* at 1483. "[This] objective standard protects the employer from the 'hypersensitive' employee, but still serves the goal of equal opportunity by removing the walls of

[2] *Andrews* goes beyond *Vinson* in that it sets out a rigid five-part test plaintiffs are required to meet before prevailing in a hostile work environment claim. Three of the five *Andrews* requirements relate to standing. *Amici curiae* take exception to these requirements to the extent that they go beyond the Court's requirements in *Vinson* regarding a hostile work environment.

discrimination that deprive women of self-respecting employment." *Id.* at 1483.

Following the lead in *Andrews*, the Ninth Circuit Court of Appeals in *Ellison, supra*, articulates a similarly practical and fair standard for evaluating whether an employer's conduct is sufficiently severe or pervasive to alter the terms and conditions of employment. After rejecting *Rabidue*'s requirement that plaintiffs show that their psychological well-being is "seriously affected," the *Ellison* court offers a sound framework for the inquiry mandated by *Vinson*: a female plaintiff states a case of hostile environment sexual harassment when she alleges "conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Ellison*, 924 F.2d at 879. In determining whether sexual harassment is sufficiently severe or pervasive to be actionable, the fact-finder should "analyze the harassment from the victim's perspective." *Id.* at 878.

Like the analysis set out in *Andrews*, the *Ellison* court's "reasonable woman" standard contemplates an objective standard for determining whether the severe or pervasive requirement has been satisfied. This standard "shield[s] employers from having to accommodate the idiosyncratic concerns of the rare hyper-sensitive employee." *Ellison*, 924 F.2d at 879. At the same time, adopting the perspective of a "reasonable woman," rather than the perspective of the alleged harasser, avoids the risk of "reinforcing the prevailing level of discrimination." *Id.* at 878.

The *Ellison* formulation of this objective requirement is squarely in accord with *Andrews*. While *Ellison* speaks of the "reasonable woman," this standard is simply the application of the "reasonable victim" standard to that particular case, where the plaintiff was a woman. The *Ellison* court noted that "where male employees allege

that co-workers engage in conduct which creates a hostile environment, the appropriate victim's perspective would be that of a reasonable man." *Id.* at 879, n.11. Thus, the *Ellison* "reasonable woman" test is substantively identical to the *Andrews* court's "reasonable person of the same sex" standard for purposes of determining liability in a hostile work environment sexual harassment case.

B. A Standard Which Takes Into Account The Perspective Of The Plaintiff Is Essential To Eradicating Sexual Harassment In The Workplace.

Although the "reasonable woman" or "reasonable victim" standard takes into account the perspective of the plaintiff, it should not be confused with the "reasonable person" standard used in traditional tort analysis. The purpose of this objective standard in sexual harassment cases is *not* to judge the reasonableness of the response of the particular woman, but to *evaluate the conduct of the harasser.* Properly used, the *Andrews/Ellison* standard focuses attention solely on the harasser's actions. It is used to "determine whether the work environment is sexually hostile" as a result of the harassing conduct. *Andrews,* 895 F.2d at 1483. This determination is made without any reference to the "reasonableness" of the response by the particular individual affected. By focusing on the defendant's conduct, this standard advances Title VII's goal of "prevent[ing] the perpetuation of stereotypes and a sense of degradation which serves to close or discourage employment opportunities for women." *Andrews,* 895 F.2d at 1483.

The "reasonable woman" standard also differs from the traditional "reasonable person" test in that it recognizes and takes into account the differing experiences of men and women. The *Ellison* and *Andrews* courts recognized that a "sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women." *Ellison* at 879. The differences

in the historical and cultural experiences between men and women are significant and numerous. An obvious example, on which the *Ellison* court focused, is the disparity in the rates of sexual assaults against men and women. *Id.* at 879.

> What makes sexual harassment more offensive, more debilitating, and more dehumanizing to its victims than any other form of discrimination is precisely the fact that it is sexual. Not only are men exercising power over women, but they are operating in a realm which is still judged according to a gender double standard, itself a reflection of the extent to which sexuality is used to penalize women. In my view, these cases are such a disaster in doctrinal terms precisely because, as with rape, they involve sex and sexuality. And yet however clear all that might be, the argument for treating these cases as violations of Title VII begins from the premise that the sexuality which lies at their core is legally invisible: They are simply cases of differential treatment based on gender. Estrich, *Sex at Work,* 43 Stan. L. Rev. 813, 819 (1991).

Acknowledging these differences is absolutely critical to understanding the principles underlying the "reasonable woman" standard for female plaintiffs. "A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women." *Ellison,* 924 F.2d at 878.

A gender-conscious standard like those of *Andrews* and *Ellison* acknowledges the social reality that sexual harassment in the American workplace is rampant and that women are disproportionately harmed by it.[3] Only by

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[3] Estrich refers to a 1976 Redbook magazine questionnaire asking its readers "whether they had been subject to unwanted sexual 'attention' at work from male bosses or colleagues. 9 out of 10 women who responded said yes, and 75% called the advances embarrassing, demeaning, or intimidating." Estrich at 821. Estrich

employing a gender-conscious standard will the law reflect the fact that offensive and oppressive sexual harassment is part of the daily working environment of many women and ensure the removal of these barriers to sexual equality in the workplace.[4]

The "reasonable woman" is not any particular person, nor even the average of some group of actual persons. Rather, the "reasonable woman" is a theoretical construct which assists the trier of fact in taking into account the differing life experiences of men and women in this society as a whole when evaluating the conduct of an alleged harasser. The purpose of the "reasonable woman" standard is to make conscious the unconscious stereotypes and biases which might otherwise color an evaluation of what is or is not acceptable behavior in the workplace. It "discards the male-biased definition of acceptable behavior and substitutes a viewpoint that acknowledges the effects of sexual harassment on women." Brenneman, *Comments: From a Woman's Point of View: The Use of the Reasonable Woman Standard in Sexual Harassment Cases*, 60 U. Cin. L. Rev. 1281, 1296 (1981).

also cites to a "more scientific study by the federal government four years later, [wherein] 42% of the women respondents reported being subjected to some form of 'sexual harassment,' at an estimated cost to the federal government of $189 million from 1978 to 1980. The harassment figures were roughly the same when the government resurveyed in 1987, but the costs over a two-year period rose to $267 million. Smaller surveys during this period, sometimes phrased in terms of harassment or unwelcome advances, consistently found that anywhere from 36 to 53 percent of the women questioned identified themselves as victims." Estrich at 822 (citations omitted).

[4] The decision of the Sixth Circuit in *Rabidue, supra*, demonstrates the dangers of omitting a gender-conscious perspective and relying solely on the purportedly neutral "reasonable person" standard in the context of sexual harassment cases. In *Rabidue*, the Court's use of a "reasonable person" standard permitted it to evaluate plaintiff's claims from the perspective of the male employees who dominated that work environment. It completely ignored the degrading effects of that environment on women. By a perversion of logic, the *Rabidue* court excused the sexual jokes, sexual conversations and pornography in the workplace because of their pervasiveness, rather than recognizing these conditions for what they are—a significant barrier to equality in the workplace.

Because the "reasonable woman" is a theoretical construct, not an empirical derivation, the particular responses of specific individuals cannot be used to define what is "reasonable." For example, the testimony of other women employees that they were not offended by the alleged harassment is largely irrelevant. These women may believe that they are unaffected by certain types of harassment because their indifference is a coping mechanism for dealing with the harassment, or because they have been conditioned to accept sexual stereotyping as a condition of employment, or simply because they are afraid of losing their jobs. The true test of "reasonableness" from this theoretical perspective is whether the conduct complained of operates as a barrier to the full participation of women in the workplace. Thus, for example, from this perspective, pornographic displays which undermine the legitimacy of women's presence in the workplace are seen as barriers to equal opportunity:

> It is doubtful that a female worker can believe her male counterparts are taking her seriously when depicted on the wall behind her is a male using another woman's naked breast as a golf tee. The poster makes the statement that women are playthings. That message flows from the wall of the workplace into the heart of it. When women in the workforce are viewed as a sexual obsession, it can prevent men from taking them seriously, and can preclude women from being able to focus on their jobs. That is an obstacle to equal opportunity. That, to the reasonable woman, is sexual harassment. Brenneman at 1295.

As the *Ellison* court noted, "a gender-conscious examination of sexual harassment enables women to participate

in the workplace on an equal footing with men." 924 F.2d at 879.

If adopted by this Court, the *Andrews/Ellison* standard will encourage employers to view the conduct of their agents and supervisors through the eyes of the reasonable woman rather than through the rose colored lens of the seemingly well-intentioned "Cyrano de Bergerac," *Ellison*, 924 F.2d at 880, whose conduct nonetheless threatens, intimidates and offends his female co-workers. The "objective" or "reasonable" element protects the employer from the "hypersensitive employee," *Andrews*, 895 F.2d at 1483; *Ellison*, 924 F.2d at 879, while adopting the victim's perspective ensures that stereotyped notions or unconscious prejudices do not serve to reinforce rather than eliminate barriers to full equality in the workplace.[5]

The *Ellison* court clearly understood the ramifications of failing to adopt a gender-based perspective, noting that "Congress did not enact Title VII to codify prevailing sexist prejudices," *Id.* at 881, and that "[a]dopting the victim's perspective ensures that courts will not 'sustain ingrained notions of reasonable behavior fashioned by the offenders.'" *Id.* at 880-1, quoting *Rabidue*, 805 F.2d at 626 (Keith, J. dissenting).[6] To reject a gender-

[5] As the *Ellison* court noted, using the victim's perspective "does not establish a higher level of protection for women than men." *Id.* at 879. On the contrary, it affirms the simple notion that an employee of either gender should be protected from a work environment that a reasonable person of that gender would find hostile.

[6] *Amici curiae* emphatically urge the Court to reject the reasoning embodied in the following passage from *Rabidue*: "Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this." 805 F.2d at 620. This position amounts to a complete abdication of the clear goal of Title VII: eradicating invidious employment discrimination. Failure to adopt a gender-based perspective will, as it did in *Rabidue*, freeze into place prevailing discriminatory attitudes, even where the conduct in question violates Title VII.

conscious standard is to effectively ignore the social and historical context of sexual harassment in this country and to trivialize the significance of this insidious form of gender discrimination.

C. A Majority Of Courts Have Adopted The Reasonable Woman Standard To Evaluate Employers' Conduct In Hostile Work Environment Cases.

The *Andrews/Ellison* standard has proven influential and workable. In the short period since these decisions have been published, courts have repeatedly followed these cases in analyzing hostile work environment claims from the perspective of a reasonable person of the same gender. Indeed, enough courts have followed *Andrews* and/or *Ellison* in sexual harassment hostile work environment cases to establish a near-consensus among the courts that have explicitly considered the perspective from which the defendant's conduct should be evaluated.

In addition to the Third[7] and Ninth[8] Circuits, courts in the Fourth, Sixth, Eighth, and Eleventh Circuits have employed the perspective of the reasonable person of the same gender as plaintiff in analyzing sex harassment hostile work environment claims.[9] While the lan-

[7] *Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990); *Smolsky v. Consolidated Rail*, 780 F. Supp. 283, 294 (E.D. Pa. 1991); *Garvey v. Dickinson College*, 775 F. Supp. 788, 800 (M.D. Pa. 1991).

[8] *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991); *Austen v. State of Hawaii*, 759 F. Supp. 612, 628 (D. Hawaii 1991).

[9] See *Smolsky v. Consolidated Rail*, 780 F. Supp. 283, 294 (E.D. Pa. 1991) (perspective of "reasonable woman" used in sexual hostile work environment analysis); *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987) (perspective of "reasonable woman" used in analysis of sexual harassment allegations relevant to constructive discharge claim); *Jenson v. Eveleth Taconite*, 139 F.R.D. 657, 665 (D. Minn. 1991) (necessity of proof of work environment hostile to a "reasonable woman" held to be a common question of law for purposes of certification of a class of females); *Robinson v. Jack-*

guage varies slightly from circuit to circuit, the analysis is conceptually identical.

The few court opinions that still insist on using a "reasonable person" standard in sex harassment cases do not discuss the standard to be used, nor do they reject a victim-based perspective.[10] There is no evidence from these opinions that these courts considered the perspective question when choosing their language. Therefore, courts that have considered this issue are nearly unanimous in analyzing employers' conduct from the perspective of a reasonable person of the same gender, as *Andrews* and *Ellison* did.

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sonville Shipyards, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) (perspective of "reasonable woman" used in hostile work environment sexual harassment analysis); *Vermett v. Hough*, 627 F. Supp. 587, 607 (W.D. Mich. 1986) (court denies liability using "reasonable woman" standard); *Spencer v. General Electric*, 697 F. Supp. 204, 218-19 (E.D. Va. 1988), *aff'd* 894 F.2d 651 (4th Cir. 1990) (court uses "reasonable person", "reasonable employee in her situation", and "reasonable female employee" interchangeably); *Garvey v. Dickinson College*, 775 F. Supp. 788, 800 (M.D. Pa. 1991) (court uses "reasonable person of the same sex in that position" in hostile work environment sexual harassment case).

[10] See, e.g. *Brooms v. Regal Tube*, 881 F.2d 412, 423 (7th Cir. 1989); *Burns v. McGregor Electronic Industries*, 955 F.2d 559, 566 (8th Cir. 1992); *Campbell v. Kansas State University*, 780 F. Supp. 755, 762 (D. Kan. 1991); *Caleshu v. Merrill Lynch*, 737 F. Supp. 1070, 1082 (E.D. Mo. 1990), *aff'd* 985 F.2d 564 (8th Cir.).

The only opinion that does analyze its choice of a standard and uses a "reasonable person" standard is *Trotta v. Mobil Oil*, 788 F. Supp. 1336 (S.D.N.Y. 1992). However, the court qualified its description of the standard so as to make its position functionally indistinguishable from *Andrews* and *Ellison* by noting that "[i]n applying a reasonable person standard, courts can take account of gender-based differences." *Id.* at 1350, n.1.

CONCLUSION

For all of the foregoing reasons, the Court should hold that a plaintiff in a Title VII hostile environment sexual harassment case is not required to prove severe psychological injury in order to prevail. Rather, the existence of a hostile work environment should be evaluated from the perspective of a reasonable person of the same gender as the plaintiff.[11]

Respectfully submitted,

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